U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: January 28, 1999

Case No.: 1996-INA-0263

In the Matter of:

ALBERT EINSTEIN MEDICAL CENTER,
Employer

On Behalf Of:

KEMAL TUNCALI,
Alien

Certifying Officer: Richard Panati, Region III

Appearance: Lawrence H. Rudnick, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On January 9, 1995, Albert Einstein Medical Center ("Employer") filed an application for labor certification to enable Kemal Tuncali ("Alien") to fill the position of Medical Resident in Radiology (PGY III and IV years) (AF 31-32). The job duties for the position are:

> Engage in direct patient care, participate in educational activities as well as teach and supervise junior residents and medical students. Diagnose and treat diseases of human body using x-ray and radioactive substance to examine internal structures and functions of organ system, assisting with diagnosis. Administer radiation and related therapies.

The requirements for the position are a medical degree and one year of experience in the job offered or one year as a radiology resident at an accredited hospital. In addition, the Employer listed the following as Special Requirements:

1. Must have successfully completed one year in ACGME-approved radiology program with excellent references by chairman or program director and with demonstrated excellence in radiologic diagnosis and treatment.
2. Must have Pennsylvania graduate trainee license or be license eligible.
3. Must have passed national medical boards Parts I and II or USMLE Steps 1-3 or ECFMG certificate plus FLEX exam, components I & II.
4. Must have demonstrated excellent research and teaching skills.

The CO issued a Notice of Findings on October 23, 1995 (AF 10-12), proposing to deny certification because the Employer's experience requirements are not those normally required for the job opportunity. Therefore, the CO instructed the Employer to establish the business necessity of the requirements.

Accordingly, the Employer was notified that it had until November 27, 1995, to rebut the findings or to cure the defects noted. The Employer requested extensions of time on November 27, 1995, and January 2, 1996 (AF 7, 9). These requests were granted and the Employer was given until February 6, 1996, to rebut the CO's findings (AF 6).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

In its rebuttal, dated February 6, 1996 (AF 5), Employer's Counsel contended that the present applicant is distinguishable from previously denied applicants because he had one year of experience in a radiology residency prior to beginning his employment with the Employer. Employer's Counsel further explained that the Alien was credited with at least one year of a PGY I for his prior experience and, as such, he began his employment with the Employer as a PGY II.

The CO issued the Final Determination on February 12, 1996 (AF 2-4), denying certification because the Employer failed to establish the business necessity of its experience requirements.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc)*. Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc)*. The *Information Industries* standard requires that the employer show the following: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and, (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige & Associates*, 91-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Mediation Center,* 90-INA-395 (June 30, 1992).

In the instant case, the CO, in the NOF, found that the Employer's experience requirements are not the normal requirements for the position (AF 11). As such, the CO instructed the Employer to change the requirements or to establish their business necessity in accordance with *Information Industries, supra.*

In rebuttal, Employer's Counsel stated that the present applicant is distinguishable from previously denied applicants because the alien had one year of experience in a radiology residency prior to beginning his employment with the Employer (AF 5). Employer's Counsel further explained that the Alien was credited with at least one year of a PGY I for his prior experience and, as such, he began his employment with the Employer as a PGY II.

We find that the Employer has not responded to the CO's findings in the NOF. The CO in this case clearly instructed the Employer to establish the business necessity of its experience

requirements (AF 11). However, the Employer merely submitted a statement from its Counsel distinguishing this Alien from previous applicants (AF 5). It is well settled that failure to address a deficiency in the NOF supports a denial of labor certification. See *Belha Corp.*, 88-INA-24 (May 5, 1989) (*en banc)*; *Our Lady of Guadalupe School,* 88-INA-313 (June 2, 1989). Furthermore, assertions by an employer's attorney that are not supported by underlying statements by a person with knowledge of the facts do not constitute evidence. *Moda Linea, Inc.*, 90-INA-424 (Dec. 11, 1991); *Mr. and Mrs. Elias Ruiz,* 90-425 (Dec. 9, 1991); *D & J Finishing Inc.*, 90-INA-446 (Nov. 4, 1991). Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.